PROBLEMS OF WORKMEN'S COMPENSATION LEGISLATION

THOMAS I. PARKINSON

The distinguishing feature of a workmen's compensation act is that it establishes a legal obligation on the part of employers to pay or to provide for the payment of a fixed or readily determinable sum in relief of the loss of income sustained by employees or their dependents by reason of industrial accidents arising out of their employment. This principle has been enacted into law by statutes recently passed in New York, Montana, and Maryland.

The New York legislature has passed two compensation acts, One[1] gives to employees injured in certain specified employments, declared by the act to be especially hazardous to employees, the right to recover a fixed compensation from their employer regardless of his negligence or freedom from it. The other,[2] applying to all employments except railroading, provides a plan of compensation which, when formally consented to by employee and employer, is substituted for their respective rights and liabilities under the existing employer's liability law.

The legislature of Montana has passed an act[3] creating a state fund for the insurance of mine workers against death or permanent total disability from accident arising in the course of their employment, and levying a tax on employers and employees for the support of the fund. Maryland has passed a similar act[4] which creates local funds in two counties for the insurance of coal and clay miners against temporary or permanent disability and death.

These are the only workmen's compensation laws in this country. The Maryland Act of 1902 (Ch. 139) was a limited death insurance act which, since it was declared unconstitutional by a lower court, has been allowed to lapse.

The Act of Congress of 1908, giving one year's wages to government employees injured in the course of their employment,

[1] Ch. 674 Laws of 1910.

[2] Ch. 352 Laws of 1910.

[3] Ch. 67 Laws of 1909, effective October 1, 1910.

[4] Ch. 153 Laws of 1910.

is an employer's voluntary compensation plan, similar to the relief provisions established by private corporations for their own employees. The Massachusetts Act of 1908[5] gives public sanction to compensation plans adopted by employers and their employees and approved by a public officer.

The interest in the subject and the apparent demand for compensation laws is now so widespread that it may seem surprising that so little legislation has been secured. By legislation is meant enacted statutes, not drafted bills. A summary of enacted laws does not, however, represent the progress made in this field during the past two years. The movement to secure the enactment of compensation laws in this country really began in 1909, when commissions were appointed in New York, Wisconsin, and Minnesota to investigate industrial accidents and employers' liability, and to suggest remedial legislation.

Prior to 1909 there had been much discussion of the theory and merit of the compensation plans of other countries; reports on the operation of foreign systems had been issued by federal and state labor bureaus; bills involving some form of compensation had been introduced in state legislatures; but serious legislative consideration of the subject had been confined to Massachusetts, Illinois, and Connecticut. In 1904 the Massachusetts legislature refused to pass a bill, modeled after the English Act of 1897, which had been drafted and recommended by a special legislative committee.

In 1907 an industrial insurance commission reported to the Illinois legislature recommending the enactment of a law permitting employers to escape their common law liabilities for industrial accidents by contracting with their employees to insure them in accordance with the provisions of the act. This bill also failed of passage.

In 1908 Massachusetts, on the recommendation of a committee which reported adversely to a compulsory compensation bill, enacted the law above referred to by which employers and employees were permitted to enter into contracts fixing rates of compensation for injuries.

While very little progress was being made prior to 1909 in securing legislative recognition of compensation, there was a general tendency throughout the country to enact laws increasing the possibilities of recovery by employees in actions against

[5] Ch. 489 amended by Ch. 211 Laws of 1910.

employers for injuries arising out of industrial accidents. These laws, commonly known as "employer's liability laws", abolished or restricted the common law or judge-made rules by which employers were able to defeat recoveries by their injured employees on the ground (1) that the injury complained of was caused by the negligence of the employee's fellow servant; (2) that the employee had assumed the risk of the accident which gave rise to the injury; or (3) that the employee's negligence had contributed to the causation of the accident. The extent to which these laws increased the employer's liability varied in different jurisdictions. Perhaps the most liberal from the employee's viewpoint was the Act of Congress of 1908 which, as to employees of common carriers engaged in interstate commerce, abolished the fellow servant rule, restricted the implied assumption of risk, and made contributory negligence of the employee a reason for reducing his damages, but not ground for dismissal of his action.

The employers' liability laws maintained the common law theory of liability, and provided for recovery by the employee only where he could show some fault on the part of his employer; they did not attempt to extend the employers' liability to those accidents which may be said to be inherent in the employment rather than due to fault or negligence. In two important particulars, however, these laws contributed to the subsequent progress of the compensation movement. They served to center public attention on the injustice of the results produced by the operation of the judge-made law relating to employers' liability. They caused employers who saw their liability increased and their liability insurance rates mounting higher and higher, with each restriction of their common law defences, to become more hospitable to the compensation idea.

In 1909 a Connecticut commission, appointed in 1907, reported that the employers' liability laws were not giving satisfaction, but that it was inadvisable at that time to recommend a compensation law. During the same year the legislatures of New York, Wisconsin, and Minnesota authorized commissions to investigate compensation for industrial accidents.

To appreciate accurately the progress made since the appointment of these commissions, it is necessary to consider (1) the extent to which public opinion has become interested to support the enactment of compensation laws, and (2) the extent to which the economic and constitutional obstacles have been overcome. Set-

tlement of the technical problems means but little in legislative progress if public opinion remains unfavorable. On the other hand, an aroused public opinion represents but little progress in legislation if economic and constitutional barriers still block the way.

Remarkable progress has been made in securing for compensation the intelligent support of public opinion. The public, exclusive of employer and employee, has awakened to its interest in the results of industrial accidents. The operation of the rules of liability developed by the judges under the common law, and to a lesser degree under the employers' liability laws, results in placing on the injured employee and those dependent on his wages the entire hardship of his injury. The injustice to these individuals as well as the possible necessity for public care of incapacitated employees or their impoverished dependents, and the probable public loss in a tendency toward lower citizenship of dependent minor children deprived of the advantages of education and home life, have given rise to a public demand that fixed or readily determinable compensation for all industrial accidents be substituted for the existing system.

Interest in the subject has spread rapidly over the greater part of the country. Commissions are preparing compensation bills for submission to the 1911 session of the legislatures in Massachusetts, Ohio, Minnesota, and Wisconsin. The Illinois Commission reported on September 15, 1910, that it had been unable to agree upon a bill in the limited time allowed for its investigations. Commissions are investigating the subject in New Jersey, Missouri, Montana, and Washington, and steps have been taken for the appointment of commissions in Pennsylvania and West Virginia. By authority of Congress President Taft has appointed a commission to consider compensation legislation for employees engaged in interstate commerce. Committees on compensation laws have been appointed by the Conference of Governors, by the Conference of Uniform State Law Commissioners, and by the American Bar Association. In addition to these official and semi-official agencies many private individuals and associations, such as the American Association for Labor Legislation, the American Civic Federation, and the National Association of Manufacturers, are actively coöperating in what bids fair to be a general movement to place some kind of compensation law on the statute books of every jurisdiction in the country.

The objection that a compensation act would seriously add to the burdens of industry in the state where it was enacted, and thereby handicap that state in its industrial competition with other states, was effectively interposed to prevent such legislation in Massachusetts in 1904, and again in Connecticut in 1909. On the one hand it is said that the added cost of compensating all injuries to workmen will drive industries out of the state which enacts such laws into states where the common law or employers' liability laws still prevail. On the other hand it is said that the industrial advantages—particularly the improved relations between employer and employee and the consequent improvement in the character of the employees' work—will make it entirely safe for any state to pass such laws irrespective of the action of other states. Germany is cited as an example of industrial development under a strict and extensive compensation and insurance law despite competition with countries where laws less favorable to employees prevailed. Evidently the "bugaboo of interstate competition" influenced the New York Commission, for its act applies only to those employments in which there is little or no interstate competition. The tentative drafts of acts prepared by the Wisconsin and other state commissions contain no such limitation.

Whatever the importance of this objection to compensation legislation in a single state, a movement has already begun to overcome it. The 1910 Conference of Commissioners on Uniform State Laws appointed a committee authorized to draft a uniform compensation law. A meeting of this committee was held in New York on December 23 immediately following a conference of the Department of Industrial Accidents of the National Civic Federation. The results of these conferences will probably go far toward removing the obstacle of interstate industrial competition by securing uniform compensation acts in all the important industrial states.

The immediate effect, however, of the efforts of the uniform law committee may be to delay progress in several states. The committee has suggested that commissions which are expected to report to 1911 legislatures should delay their reports, if possible, until a uniform act is prepared and agreed upon. It is easier to secure uniformity in this way than by substituting a uniform act for one previously enacted. This suggestion may delay the reports of the commissions of Minnesota, Wisconsin, Massachusetts, and Ohio, or may influence the action

of the 1911 legislatures in these states. According to the rules of the Conference on Uniform State Law, any act drafted by the committee on compensation must be reported to the 1911 Conference and agreed to by the Conference before being reported to the several state legislatures for enactment.

Employers as well as employees are convinced that some form of compensation law is desirable. There are, however, some important details upon which compromises must be effected before any particular bill will receive the support of both the parties directly affected. Employees believe that all existing rights and liabilities respecting compensation for injuries should be abolished and the whole law of employers' liability embodied in a compensation act. Employees seek to retain their existing rights and remedies concurrently with the added advantages of a compensation act. The New York compulsory act does not abolish existing remedies, but puts the injured employee to his election after the accident whether he will proceed under his old remedies or under the compensation act. The tentative draft of an act prepared by the Minnesota Commission abolishes all existing remedies. Other suggested bills abolish existing remedies, except where the injury is due to the personal negligence of the employer. In order that the objectionable features of common law litigation may be entirely removed from the law of employers' liability it seems desirable that the existing remedies be repealed so far as it is possible to do so. This was the conclusion of the conference of commissioners at Chicago on November 10, 1910. The principal difficulty, in addition to the attitude of the employees, is a constitutional one which will be considered later.

Again, employers and employees are not agreed as to the rates, terms, and period of compensation. Employers contend that compensation acts should distribute the burden of industrial accidents, not transfer it entirely to the industry, and therefore that the compensation payable to the employee should be less than his entire loss. Employees contend that the industry rather than the employee should bear the burden of losses inherent in the industry.

The New York acts give to dependents of a killed employee a sum equal to twelve hundred times his average daily wage not exceeding a total of $3000, and to wholly or partially disabled employees a sum equal to 50 per cent of their loss in average weekly earning capacity, not exceeding the sum of $10 per week, for a period of eight years. These provisions are subject to the

limitation that in no case shall the compensation exceed the damage suffered.

A more liberal scale of compensation is provided by the tentative bill prepared by the Wisconsin Commission. In case of disability the injured employee is allowed 65 per cent of his weekly wage, not exceeding three times his annual wage for any one injury, for an aggregate period not extending beyond fifteen years. Dependents of a killed employee are allowed a sum equal to three times his annual earnings not exceeding a total of $3000, payable in weekly intalments.

The schedule of rates agreed upon at the Chicago Conference in November of this year was as follows: For temporary or permanent disability one half of the impairment in wages, but not more than $10 nor less than $5 per week for not more than three hundred weeks. For total dependents in case of death a sum varying from 25 to 60 per cent (according to number of dependents) of the employee's wages, but not more than $10 nor less than $5 for not more than three hundred weeks.

These provisions indicate in a general way the tendency of proposed legislation. It is difficult to estimate how far employers and employees differ as to the fairness of these allowances. As bearing upon this question, however, it is interesting to note the attitude of the employees' representatives on the Illinois Commission which on September 15, 1910, reported their inability to agree on any recommendation with regard to compensation. They stated flatly that they would not agree to compensation laws unless they had first secured liberal employers' liability laws. The obvious purpose of this position is to secure a lever by which to increase compensation rates. At the present time the employer can say to the employee, "You ought to be satisfied with compensation of 50 per cent of your wages for a limited period; you will at least get something where now you have nothing." If the employee can secure employers' liability laws as liberal as the Act of Congress of 1908—and the tendency is certainly in that direction—his possibilities of recovery without compensation laws will be much increased. He may then say to those who propose compensation laws that the sums fixed by those laws must be reasonably proportionate to his rights under the employers' liability laws. In other words, the employee may well believe that in fixing the rates and period of compensation, legislatures are apt to be influenced by the rights of employer and employee exist-

ing at the time the compensation law is passed. If before that time the employee succeeds through more favorable liability laws in increasing the amount which employers are obliged to contribute annually to their injured workmen, may he not reasonably expect that the rate of compensation will be proportionately higher?

If it be contended that there is a limit to the burden which industry can bear, the employee may reply that an actual test should be made; that for many years society has tested the employee's ability to bear the loss involved in industrial accidents, and the employee has paid the cost of the experiment; and that until it is actually demonstrated that industry cannot bear the cost of fair compensation for the full period of incapacity or dependency the cost of further experiment should be borne by the industry. The serious answer to this position, however, is that employees as well as employers have an interest in the preservation and extension of our established industries, and experiments which may seriously handicap or ruin an industry are more serious to the employees than their present losses incident to industrial accidents.

The determination of fair rates and terms of compensation—fair to employer and to employee—requires a thorough study of existing conditions in the various industries, and, until such a study has been made, estimates of what is fair, or of what the industry can bear, can be little better than guesswork.

The principal impediment to progress in securing workmen's compensation legislation in this country has been the contention that it is unconstitutional. To appreciate this difficulty it is necessary to keep clearly in mind the chief purposes of this legislation. Briefly these are: (1) to secure to employees compensation in all cases of injury through accidents which arise from risks inherent in the particular employment; (2) to make this compensation either fixed or readily determinable without resort to common law rules of damages or jury trials; (3) to do away with the waste of time and money and the hostility between employer and employee involved in litigation over the fact and the measure of liability.

The constitutional objections urged against compensation legislation are:

1. That it is an unwarranted interference with individual rights of personal liberty and private property guaranteed by the Four-

teenth Amendment to the United States Constitution, and by similar provisions in most of the state constitutions; and that the limitation of such legislation to specified classes of employments entails a deprivation of the equal protection of the laws.

2. That the attempt to create a fixed liability to pay a fixed compensation without resort to a jury trial deprives the employer or employee, or both, of the constitutional right to trial by jury.

3. That a fixed compensation is forbidden by specific provisions in the constitutions of some states.

The Fourteenth Amendment provides: ".....Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In considering whether a compensation act violates these provisions it is important to determine whether the act is to be limited to accidents inherent in and incident to the risks of the employment, or is to cover all accidents causing injuries to the employee in the course of his employment. Shall the act cover, for example, the English case where a workman while opening a bottle containing part of his luncheon sustained an injury resulting in blood poisoning and death? The injury happened in the course of, but was not inherent in or incident to, his employment. It might have happened to him or anyone anywhere. If the act covers such injuries it will probably be held unconstitutional, because it takes the employer's property without his consent, and without his fault, and without any peculiar circumstance requiring an exercise of the state's police power, and gives it to the employee to relieve him from the hardship of a pure accident.

The New York act is limited to "personal injury by accident arising out of and in the course of the employment.....caused .....in whole or in part.....by a necessary risk or danger of the employment, or one inherent in the nature thereof." Even when thus limited, compensation laws necessarily impose on employers the liability to compensate workmen whose injuries cannot be traced to any fault of the employer. It is said that fully 50 per cent of industrial accidents are due to risks of the trade rather than to any fault of employer or employee. "They just happen." Such accidents cannot be prevented, as industry is now conducted, by any degree of care on the part of the employer, and if he is made liable for them he becomes practically an insurer

of the safety of his employees. A law establishing such a liability involves the taking of employers' property for the benefit of employees; but whether it amounts to deprivation of property within the Fourteenth Amendment depends upon its reasonableness as an exercise of the power of the state to establish regulations for the public safety or welfare.

In support of the reasonableness of such a law it has been suggested that similar degrees of liability are well known at the common law. The owner of dangerous property or animals is absolutely liable for the damage done by them, irrespective of his care in preventing it. The United States Supreme Court has recently upheld a state statute making railroad companies absolutely liable for injuries to passengers. In like manner it is argued that the state may provide that an employer who voluntarily enters into a particular business thereby assumes the risk of all accidents inherent in and incidental to that business, irrespective of the possibility of preventing such accidents.

Without reference to analogies at the common law, the principle of liability without fault may be sustained as a reasonable exercise of the state's police power, if it can be shown that existing social and industrial conditions require that the burden of all industrial accidents be transferred from the employee to the employer. The courts have not laid down any general rule limiting the police power or defining what is a reasonable exercise of it. It is settled, however, that, in order to justify state interference with personal liberty or private property, there must exist conditions which reasonably require regulation involving such interference.

Can it be said that such conditions exist in all employments? Some employments, such as railroading, subject employees to constant risk of serious injury. Clerks, on the other hand, may be exposed to less risk while at work than while going to or from their places of employment. So far as a compensation act is dependent on existing conditions, it seems more likely to be held a valid exercise of the police power if it is limited to hazardous employments. For this reason the New York act applies only to specified employments declared by the legislature to be extra-hazardous.

This limitation of the act to selected employments gives rise to the additional constitutional objection that, unless the classification which forms the basis of the selection is fair and reason-

able, those who are thereby subjected to the special burden are deprived of the equal protection of the laws. A reasonable classification of employments is as difficult to define as is a reasonable exercise of the police power.

It would seem, however, that not all the employees of an employer engaged in a hazardous industry, but only those subject to the hazards of the industry should be included in the act if the classification is to be upheld by the courts. The classification upon which the New York act is based, as shown by the Commission's report, depends, not on the presence of hazard, but on the absence of interstate industrial competition, and this fact is seriously urged against the constitutionality of the act in the litigation now pending in the New York Court of Appeals.

Various schemes of classification have been suggested. One state commission proposes tentatively that all employers of a specified number of workmen shall be subject to the act. This is a species of classification which has been held constitutional for other purposes. Again, it has been suggested that the act apply to all "hazardous employments", leaving it to the courts to determine which are such. It seems better, however, and ought to be possible for the legislature to determine with reasonable accuracy what are the employments in which there is grave danger of serious injury to employees and to pass an act specifically applying to employees subject to the hazards of such employments.

Many state constitutions contain provisions guaranteeing the right of trial by jury in civil cases. A similar provision in the United States Constitution applies only to actions in the United States courts and does not affect state legislation. It is objected to compensation laws that they deprive both employee and employer of this fundamental right.

The employee's right of trial by jury would probably not extend to those cases where his right to recover depended wholly on the compensation act, that is, those cases where his employer is not now liable. The legislature in giving the employee a new right may prescribe the remedy by which he shall enforce it. But in those cases where the employee now has the right of trial by jury in actions of tort against his employer it seems that an attempt to substitute any other mode of determining his right to and the amount of his damages would deprive him of his constitutional right. It is for this reason that, in most of the suggested bills, the employee's existing rights, including the jury trial where he is now

entitled to it, are not abolished but are continued concurrently with his additional right to compensation.

The right to jury trial may be waived. Therefore it may be provided that the employee must elect after the accident whether he will proceed under the compensation act, or will insist on his common law rights and remedies. One of the purposes of compensation laws is to avoid common law litigation, and, particularly, jury trials. Since the employee's right to a jury trial must be left to him in the cases mentioned, it has been suggested that there be inserted in the law a provision making his election of his remedy a bar to any other procedure for the same claim, and an additional provision which will act as an inducement to the employee to elect to proceed under the compensation law.

The employer is likewise entitled to trial by jury. If, however, the legislature creates a liability in all cases of accident, and also fixes the amount of that liability, there is little left for a jury to try except the question of the employee's wilful negligence, and whether the accident occurred in the course of his employment. Even in these cases jury trials should be dispensed with if possible in order to secure the full advantages of compensation.

The New York act does not attempt to abolish the jury trial. It provides that all disputes as to compensation shall be settled in the usual way by suit at law, including the trial of questions of fact before a jury.

As a substitute for jury trial, compulsory arbitration has been suggested as a means of settling disputes. The legislature may require employer and employee to submit their disputes to an arbitrator prior to bringing them before a court, but there is some question of the legislative right to provide that an appeal from the arbitrator's award shall be disposed of by the court only, without a jury. If the appeal must be tried before a jury, arbitration will not get rid of the annoyances of jury trials, but it will probably decrease their number.

The Wisconsin tentative bill creates an "Industrial Accident Board", with power to decide all disputed questions arising under the compensation act, subject to a limited right of appeal to the courts. The court without a jury is authorized to pass upon such appeals.

Another suggestion for the elimination of the jury trial is that the provisions of the compensation law—particularly instalment payments and increases and decreases in the amount of such pay-

ments—create equitable, rather than legal rights, which require for their enforcement a procedure unknown to the common law, and that, therefore, all questions arising under the act may be finally settled by a judge sitting in a court of equity without a jury.

These are the principal constitutional objections to the compensation laws. The right of all persons to personal liberty, private property, and trial by jury are fundamental constitutional guarantees, and compensation laws must be made to conform to them. A few years ago the guarantee of personal liberty and private property would have been considered fatal to compensation. The courts are gradually taking a broader view of the state's power to legislate for the public welfare consistently with these constitutional guarantees to the individual, and are constantly discovering "constitutional loopholes" by which social legislation having the support of public opinion may be fitted into our legal and constitutional systems. If existing social and industrial conditions resulting from industrial accidents afford a reasonable ground for the extension of employers' liability to all accidents, except those due to the wilful fault of the injured employee, then such legislation will be upheld as a valid exercise of the state's police power. The constitutionality of the law depends upon its reasonableness, and this depends upon the existence of the conditions which are said to require its enactment.

The constitutional right to trial by jury—while it must be admitted that it is a serious obstacle to a compensation law which would abolish all existing employers' lability law, substitute therefor the provisions of the compensation act, and provide that all disputes be settled without recourse to jury trials—is nevertheless consistent with a law which secures many if not all of the substantial advantages of compensation.

The Wisconsin bill attempts to avoid the constitutional difficulties by making the enforcement of the compensation plan dependent upon its acceptance by employer and employee. By this method the act is made to rest, not upon the state's power to regulate, but upon the contract, express or implied, of the parties affected.

Where the constitutional difficulties arise not from fundamental principles of constitutional limitation, but from specific provisions in state constitutions in the nature of legislative enactments —as, for example, the New York provision that the legislature shall not limit the amount recoverable in actions for damages for

injuries resulting in death—it may be necessary, and should not be difficult, to amend the constitution to permit the enactment of a compensation law.

Some of these constitutional questions will be settled by the decision in the case of Ives vs. South Buffalo Railway Company which will be argued before the New York Court of Appeals early in January, 1911. It may be that the decision in that case, which involves the validity of the New York compulsory act, will be announced by the court in time to enable 1911 legisatures in other states to profit by the New York experience before determining upon the precise form and contents of their compensation act.

The decision of the United States Supreme Court in the case now pending before it, involving the constitutionality of the federal employers' liability law of 1908, will throw some light on the question of the power of Congress to pass a compensation law applicable to employees engaged in interstate commerce.

In conclusion, it may be said that at the close of the year 1910 there is general agreement among those who have considered compensation for industrial accidents that some form of compensation act is now desirable and demanded in this country; that compensation bills prepared by special legislative commissions will be introduced at the 1911 sessions of the legislatures of Massachusetts, New Jersey, Ohio, Wisconsin, and Minnesota; that the coöperation of the several state commissions, and the efforts of the Conference of Uniform State Law Commissioners, are preparing the way for uniform state compensation laws in the chief industrial states; and that the constitutional difficulties are no longer regarded as insurmountable, but only as requiring careful investigation of the conditions which are said to justify the law, and careful statement of its provisions.

The study of conditions is also required for the determination of the mooted questions of a fair rate and period of compensation. The progress of the compensation movement in the future will depend upon the extent to which, by scientific study of conditions, the details of the law are intelligently determined with fairness to all parties, and the reasonableness of the law as an exercise of the state's police power is legally established. The drafters of constitutional and effective compensation laws must prepare themselves by careful study of the law and the facts, and they must see that the provisions of the law are couched in language of the utmost precision.